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IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

No. 80-1577

CITY OF MESQUITE

Appellant

v.

ALADDIN'S CASTLE, INC.

Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S REPLY BRIEF

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ARGUMENT AND AUTHORITIES

In reply to Appellee's Brief on the merits Appellant submits the following points.

JURISDICTION

Appellee in its brief upon the merits levels an attack upon the jurisdiction of the Court to hear this appeal months after the time allowed by Rule 16, Revised Rules of the Supreme Court of the United States, to file a motion to dismiss or affirm and that period prescribed by Rule 22, Revised Rules of the Supreme Court of the United States, for filing a brief in opposition to a petition for writ of certiorari.

Nor does the argument presented, p. 10, Appelle's Brief appear to be grounded upon jurisdiction but rather argument as to how the Court should approach consideration of the issues.

The "adequate state law grounds" argued by Appellee is a corresponding provision of the Texas Constitution, for all practical purposes, identical to the provision of the United States Constitution in question. A decision upon one necessarily requires a decision upon the other, to wit:

> ". . . . nor be deprived of life, liberty or property, without *due process of law. . . .*"

Fifth Amendment to the United States Constitution, and

> ". . . . nor shall any State deprive any person of life, liberty or property without *due process of law;* nor deny to any person within its jurisdiction the *equal protection of the laws.*"

Fourteenth Amendment to the United States Constitution, and

> "All free men, when they form a social compact, have equal rights. . . ."

Article I, Section 3, Texas Constitution, and

> "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the *due course of the law of the land.*"

Article I, Section 19, Texas Constitution.

It is obvious that, while the language is slightly different, the protection afforded is identical and Appellee makes no attempt to distinguish between these due process and equal protection guarantees of the two Constitutions.

Under the heading of "Interpretive Commentary" at p. 248, Vernon's Constitution of the State of Texas Annotated, an annotation to Article I, Section 19, thereof, it is stated:

> "It has been held by Texas courts that the clause of the Texas Constitution, to the extent that it is identical with the Fourteenth Amendment has placed upon the powers of the state legislature the same restrictions as those which have been held to be imposed by the language of that amendment to the Federal Constitution." (Citing *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 1897).

That the courts construe the due process clauses of the two Constitutions identically is demonstrated by the language in *State v. Texas City,* 295 S.W.2d 697, at 704 (Tex. Civ. App. — Galveston, 1956) affirmed, 157 Tex. 450, 303 S.W.2d 780, appeal dismissed 355 U.S. 603;

> "We entertain no doubt that the due process *clauses* of the *State and Federal Constitutions* constitute an effective restraint upon all powers of government .... See also the interpretive commentary under Art. I, Sec. 19, Vernon's Texas Constitution."

Also, at p. 796,

> ".... we feel that relators' claim of unconstitutionality based upon the due process CLAUS*ES* must be overruled." (Emphasis Added)

Nor can the phrases "equal rights" and "equal protection of the laws" be distinguished. See Interpretive Commentary at p. 218, Vernon's Constitution of the State of Texas, Annotated.

Thus, there is no separate body of Federal and State law involved.

Even the Court of Appeals opinion does not suggest that a distinction exists between the provisions (notes 14 and 15), but treats the provisions as identical.

Therefore, Appellee's suggestion that this Court should decide the case upon State law ground instead of Federal Constitutional grounds is without merit. To decide one is to decide the other and vice versa.

The concept that a state could bar litigants from appeal to the United States Supreme Court by the simple expediency of adopting a constitution exactly identical to the Federal Constitution is not worthy of serious consideration. Yet, if Appellee's argument is correct such a result is indicated.

This Court judicially knows that many States pattern many areas of their State Constitution after the Federal Constitution and that when a provision or state act offends a provision of the Federal Constitution it would logically folow that such offending provision or act would likewise offend a similar guarantee in a State Constitution patterned after such Federal guarantee.

Thus, it is clear that Congress did not intend to bar appeals under 28 U.S.C. 1254(2) simply because a State might have a similar Constitutional guarantee and that decision on the Federal question would, of necessity, decide the identical state question.

Rather, Appellant submits, the intent of 28 U.S.C. 1254 (2) is that *separate* state law questions not be decided by appeal.

Nor will a decision by this Court on the Federal question presented amount to an "advisory opinion" as contended by Appellee, but will be binding upon the Courts of the State of Texas and will settle important questions of law and procedure in all the states comprising the Fifth Circuit.

Therefore, Appellee's jurisdictional attack is both untimely and without merit.

The real question presented by the appeal is not so much the proper construction of the Constitutional provisions, whether it be Federal or State, but the type of test to be applied to the evidence; or, put another way, the burden of proof.

This question is solely a question of Federal Constitutional law developed by the Federal Courts. See *Shapiro v. Thompson*, 394 U.S. 351 (1974) (J. Harlan dissent. op.) for a discussion of the origin of the compelling state interest rule.

Conceded, the Court of Appeals for the Fifth Circuit devotes one and one-half pages of its opinion, 630 F.2d at 1039, to a discussion entitled "rational basis" with additional discussion under the heading "truancy" and "exposure to corrupting influences".

The cornerstone of that court's decision is found, however, at 630 F.2d, 1040

> "The record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person 'who would promote gambling, the sale of narcotics and other unlawful activities' while in a coin-operated amusement center in Mesquite."

and,

> "If such people do go to the center, there is no evidence that they are drawn by the machines."

Also, same page,

> "The District Court recognized, as we do, that *the City presented no evidence* that such people ever come to these centers." (Emphasis Added)

The Court of Appeals, by the last quoted statement, demonstrates its clear break with the District Court application of the rational basis test.

The District Court, applying the rational basis test, upheld the ordinance without requiring Appellant City to come forward with evidence in accordance with a line of cases by this Court cited at pp. 12-16 of Appellant's Brief, particularly *Vance v. Bradley*, — U.S. — 99 S.Ct. at 950,

> "In an equal protection case of this type, however, *those challenging* the legislative judgment must *convince the court* that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker." (Emphasis Added)

The Court of Appeals broke with the line of cases cited and reversed the District Court by placing the burden of proof upon the City as in strict scrutiny cases, citing cases dealing with such fundamental rights as the right to decide whether or not to bear a child. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. at 505-7 (1965).

Note that the foregoing is not offered by the Court of Appeals under the heading "Strict Scrutiny" but under the purported analysis of the "Rational Basis".

The Court of Appeals, then, applied the strict scrutiny test under both headings by first determining that a fundamental right existed and reasoning backward to conclude that the burden of proof was on the City to come forward with the evidence, absent any presumption of validity and that the City having such burden, failed to carry this burden.

Simply placing a designation of "Rational Basis" above a discussion involving the concepts of strict scrutiny does not render it a finding of lack of a rational basis.

City submits that the Court below failed totally to apply the rational basis test as applied by this Court in the cases

cited in Appellant's original brief and herein and that such error was the basis of that court's reversal of the District Court.

It is true that the appeal is not from the opinion but from the judgment of the Court below reversing the District Court. City submits, however, that the error of the Court below in reversing the District Court was an error in application of Federal law and that any State law concepts are purely incidental.

Neither the District Court nor the Court of Appeals decision suggests that there is any comparable State doctrine that places the burden of proof upon the proponent of State legislation.

The Court below cites *Texas Women's University v. Chayklintaste*, 530 S.W.2d 927 (Tex. 1975) as citing *Reed v. Reed*, 404 U.S. 71 (1971).

Note that in citing *Reed v. Reed*, Supra, the Texas Supreme Court was applying *Federal* law and not State law. All of the authorities cited by the Texas Supreme Court in its opinion except on a point of mootness not material herein were authorities on a federal question, not a State question.

In the same paragraph in which *Reed v. Reed*, Supra, is cited the Texas Court cites *Johnson v. Robinson*, 415 U.S. 361 for the authority (530 S.W.2d at 928),

> "When no suspect categories are involved, *any rational basis* may justify the classification. (Emphasis added).

The Texas Supreme Court further states, 530 S.W.2d at 929,

> "The respondent offered no evidence on this point."

Likewise, in the instant case, Appellee offered no evidence on matters of concern regarding corrupting influences and other state interests.

It is clear then, that under either Federal or State law, the burden of proof is the same, i.e. if "the classification is not based upon any patently invidious basis" *Texas Women's University v. Chayklintaste,* Supra, 530 S.W.2d at 929, citing *Prostrollo v. University of South Dakota,* 507 F.2d at 782 (8th Cir. 1974) the burden is on the challenger of the legislation.

If the classification involves suspect criteria or certain "fundamental" rights, e.g., speech, right to bear or not to bear a child, or other equally basic rights, then the burden is on the proponent.

This is the Federal question presented. When it is resolved, the Texas Courts will follow the decision of this Court as it did in the *Texas Women's University* case.

The other Texas Supreme Court decision cited by the Court of Appeals, *City of University Park v. Benners,* 485 S.W.2d 773 (Tex. 1972) states the Texas rule in accord with the District Court's judgment, 485 S.W.2d at 778-79 as follows:

> "The question which then occurs is whether respondent discharged the *extra-ordinary* burden of showing that the exercise of the police power here was not lawful. As complainant, she was under the burden of showing that no conclusive, or even fairly issuable facts or conditions exists in support of that exercise of the police power." (Emphasis Added)

Thus the law of the State of Texas as enunciated by its highest court and the rule of law of this Court are identical as to burden of proof in cases of this type and the reasons offered by Appellee for deciding the case upon a State law

question are inapplicable and the action of this Court in noting probable jurisdiction was correct.

PROHIBITION V. REGULATION

Appellee offers a line of authorities involving prohibition of activities sanctioned by State statute or regulation by a City contrary to regulation by State Statute.

City of Fort Worth v. McDonald, 293 S.W.2d 256 (Tex. Civ. App. 1956) involved an ordinance of the City of Fort Worth, Texas absolutely prohibiting pinball machines.

Berry v. City of Fort Worth, 132 Tex. 599, 124 S.W.2d 842 (1939) involved an attempt to regulate interest rates and define usury, where sole authority to do so reposed in the State Legislature.

Since Appellee admits, (p. 18, Appellee's Brief) that Mesquite, as a home rule city, may regulate establishments such as Aladdin's Castle, the cases cited by Appellee are not in point.

In *City of Denton v. Denton Home Ice Co.,* 27 S.W.2d 119 (Comm. app.) op. adopted by S.Ct. the Court stated, 27 S.W.2d at 121,

> "The action of the City in this case is characterized as socialistic and *unwise.* It is not within the province of this Court to pass on the wisdom of the law or the wisdom of the City in exercising its power thereunder."

Rather, the law of Texas with respect to legislative power to make classifications is enunciated by the Supreme Court of Texas in *County of Cameron v. Wilson,* 326 S.W.2d 162 (Tex. 1959), at 166,

> "The applicable rule is that 'when a law duly enacted is attacked as unconstitutional' the law is presumed to be valid and doubts as to its constitutionality should always be resolved in favor of constitutionality."

This, then, is the law of the State of Texas with respect to classification. The learned trial judge of the Federal District Court, being familiar with the law of the State of Texas, found no State law problem with the age regulation.

With respect to the Texas law of estoppel, the forum, and not the State determines its application. Since neither the Federal District Court nor the Court of Appeals found any grounds for estoppel that issue is not presented.

All of Appellee's argument, then, with respect to State law, both on jurisdiction and on the merits is without merit.

FOURTEENTH AMENDMENT CHALLENGE

Most of Appellee's argument is a reiteration of points contained in the opinion of the court of appeals and addressed in Appellant's original brief. That argument will not be repeated but is relied upon herein. Appellant will address certain new matters offered by Appellee's Brief.

A. Nature of Classification.

Appellee, at p. 22, Appellee's Brief, disagrees with Appellant's concept of the nature of the classification, denying that the classification under review is that created by the "restriction".

Clearly the "restriction" (age limitation) is the classification.

There is no evidence in the record as to what restrictions may be upon other juvenile activity such as bowling, miniature golf and carnivals and the case was not tried upon such basis. The only comparison was between another coin-operated amusement center called "Fun-Fair" in Big Town Shopping Center (J.A. 38-41).

If Appellee had desired that the case be decided upon this issue, it could have offered the entire city code into evidence in an attempt to show a lack of similar regula-

tion; offered evidence that there were in fact such establishments within the City and that juveniles frequented such places, causing problems similar to those addressed by the instant ordinance.

Appellant could then have attempted to show that the problems addressed by the instant ordinance did not occur at the bowling alleys; that children rarely visit a bowling alley unaccompanied by adults; that the bowling alleys employ off-duty police officers to see that such problems are kept to a minimum because such establishments appeal to *family* type trade.

This, then, is the vice of allowing an issue to be raised upon appeal when not tried in the trial court. Litigants will feel obliged to offer evidence upon each and every *potential* issue that *might* be raised rather than limiting proof to those issues fairly raised by the pleadings and the proof offered by the moving party. Trials could take months to try instead of days and litigants might still miss some potential issues.

It is clear then, that the only classification issue raised in the trial court was the classification of persons under seventeen separately from those over seventeen years of age. *That is the restriction* of the ordinance. The ordinance does not *negate* similar restrictions upon other activities but simply leaves such question to other ordinances, if needed.

B. Merits of the Classification.

Appellant concedes that the line between one day under seventeen years of age and one day over seventeen years of age is very narrow and likely of little significance. Persons slightly under seventeen may well be more mature than other persons over seventeen years of age.

Nevertheless, age is a factor commonly used to classify persons. There is as much rationality in using the seventeenth birthday as a dividing line in the instant case as

using the eighteenth birthday as a line of demarcation in the right to vote or right to contract.

As they approach the age of majority, young people are trying to find their place in society and in life. Peer pressure is strong. Refusal to make a small wager or "smoke a joint" may brand a youth as "chicken". If money is lacking, a person may be "chicken" if he does not join in a small burglary or filch money from home after funds for lunch and other necessities have been exhausted.

Thus, as children progress from infancy to majority, there is no question that some parental supervision is needed. See *Ginsberg v. New York*, 390 U.S. 629 (J. Stewart), (Concurring Opin.), 390 U.S. at 649,

> "I think a State may permissibly determine that, at least in some precise delineated areas, a child — like a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantee."

Appellee, and apparently the Court below, would belittle the financial impact involved by the phrases "spend a quarter on a game" (p. 38 Appellee's Brief) and "drop a quarter in the slot", 630 F.2d 1043, as if there were evidence in the record that most, or even one, for that matter, of the customers only spend twenty-five cents; concluding that the expenditure of money does not involve the "inability to make critical decisions in an informed, mature manner". *Bellotti v. Baird*, 443 U.S. at 634.

It is doubtful that the smoking of one cigarette, or one marijuana cigarette, standing alone, or the consumption of one drink of alcohol, standing alone, would cause any great lasting harm.

These are, however, abstract theories that have no application to real life.

The reason that tobacco and alcohol consumption by minors is restricted or prohibited is that one drink or smoke tends to lead to another and the same is true of "dropping a quarter in the slot".

Appellant fails to follow the logic of Appellee's assertion that the instant ordinance burdens the parent by requiring a visit to the establishment but that the New York law that required the parent to personally visit the bookstore in *Ginsberg v. New York,* 390 U.S. at 639, to purchase the restricted magazine did not burden the parent. It would seem that each time a new magazine was purchased, it would require a separate visit to the bookstore.

It is therefore evident that real differences exist between the class consisting of persons under seventeen years of age and the class of adults; albeit, with some degree of overlapping; and that the classification based thereon does promote legitimate State interests even if the wisdom of the classification be questioned.

THE STATUS OF CHILDREN UNDER THE LAW

Appellee cites numerous authorities as controlling in this case as if the fact situation in the cited cases were analagous to the circumstances in this case.

Appellee cites *Cohen v. California,* 403 U.S. 15 (1971) at p. 33 Appellee's Brief. The only mention of children is a quotation from the State Court. It does not appear that consideration of children played any part in the decision of this Court. Also, the opinion states, 403 U.S. at 18,

> "Thus we deal here with a conviction resting *solely upon 'speech'* . . . ." (Emphasis Added)

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) involved speech and race, but not children.

While it can be assumed that users of the public schools are children, *Gilmore v. City of Montgomery,* 417 U.S. 556

(1974) did not involve rights of persons *as children*, but as a *race*.

Coats v. City of Cincinnati, 402 U.S. 611 (1971) did not involve children.

Conceded, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Bellotti v. Baird*, 443 U.S. 622 (1979) do involve the rights of children; *Tinker v. Des Moines Independent Community School District* involving speech and *Bellotti v. Baird* involving the right to decide whether or not to bear a child.

Appellant further concedes that the instant ordinance provides a parental veto over the ability of a minor to play coin-operated amusement machines as in the cases of *Planned Parenthood v. Danforth*, 428 U.S. 52 (right to abortion) and *Ginsberg v. New York*, Supra (right to view "girlie magazines").

Appellee would have this Court, as did the Court of Appeals, select phrases from cases involving matters far removed from the circumstances of the instant case and blindly apply such phrases to the instant case.

In *May v. Anderson*, 345 U.S. 528 (1953) Justice Frankfurter cautioned against this, 345 U.S. at 535, (Frankfurter Concurring Opin.),

> "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children."

Appellee argues that the act of the Mesquite City Council in classifying minors differently from adults with respect to the right to do as they please is irrational. Yet the combined wisdom of the nation as a whole belies this argument.

Nor is this purely private action. Everywhere parental control is buttressed by State action. States almost uni-

formly make exceptions in their laws to further parental control; even to the extent of allowing parents to physically assault their child (corporal punishment) to subject the child to the will of the parent.

Throughout recorded history the child has been subject to the parent. Whatever our religious persuasion, the passage from the New Testament, Luke, Chapter 2, Verse 51,

> "And he went down with them, and came to Nazareth *and was subject unto them*". (Emphasis Added)

is widely accepted as the norm for a twelve year old child.

Of course, there are limits to which the authority of the parent exists over the child. The State may not exert its power to give a parent an absolute veto over the right to an abortion, *Bellotti v. Baird*, Supra, and school personnel, only partially fulfilling the role of parent, may not prohibit non-obstructive debate.

No doubt, if the corporal punishment was too severe some right of redress would exist.

Likewise, when the action of the parent is deemed too harmful to the child, the State may curtail parental control. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Child Labor Laws).

With the exception of abortion cases, however, the State act[i]n struck down has been action in derogation of the parental role rather than action enhancing parental control.

FIRST AMENDMENT CLAIM

Appellee raises for the first time in this Court the question of right of expression of the "*Author*" (designer) of the machines contending that the product is *art* and asks this Court to create a whole new body of law providing substantive rights heretofore unheard of in this context.

Note at the outset that the ordinance is *content-neutral.*

The ordinance does not attempt to dictate what theme may be entered or the *appearance* of the machine. Neither the scantily clad female figures on the pinball machines nor the violence of mass destruction of cities, planets or space ships is addressed by this ordinance. Thus, the *designer,* called author, is in no wise inhibited with respect to content.

This is not, however, the ground upon which Appellant opposes this concept.

All objects made or fabricated by man and all natural objects the subject of a selection process by man are subject to a claim of art or expression.

Art, under the law, may not be determined according to one's admiration or lack of admiration of its relative beauty. A representation of a pile of junk or a ramshackle farm house with its characteristic outbuilding may be hung in an art gallery alongside representations of magnolias in bloom or an undisturbed snow-covered landscape because the author has the right to choose his subject and the viewer has the right to appreciate what he will in the field of art.

The rights are not the same, however, when the object itself is offered.

The pile of junk may harbor snakes and rodents and the ramshackle house with no indoor plumbing facilities may create fire and health hazards and both lower property values in the neighborhood.

Thus, the objects themselves are far more subject to regulation than the representation.

Appellant does not contend that art consists only of pictorial representations of objects and acknowledges that many objects may themselves be works of art. Correspondingly many objects of great beauty and intricate design are not art.

A sword or dagger ever so intricately carved, when carried on the person for defense or offense, is a weapon, generally prohibited.

Thus, an object may be art or utility, depending upon its use, purpose and utility together with its setting.

Of course, an object of art may have a degree of utility and *objects of utility may be artfully designed.*

This last observation illustrates the danger inherent in Appellee's position.

If objects of utility, because they are artfully designed are to be given First Amendment protection and the strict scrutiny test applied, governing will be extremely difficult.

Most goods and services are rendered attractive to potential customers. Prostitutes wear makeup and dress in a manner to make their services more attractive and home builders include carpet, paneling and colorful wallpaper to make their product sell.

Appellee states, (p. 31 Appellees's Brief)

> "Development of a new game takes a manufacturer from eight months to a year and requires a substantial investment. (Citation omitted) Games sell for as much as $5000 each".

Appellant submits the following thought:

> "Development of a new model of automobile takes a manufacturer from eight months to a year and requires a substantial investment. Automobiles sell for as much as $5000.00."

Therefore, to clothe the designer of an amusement machine with the status of an author with First Amendment protection would give rise to a similar right to designers of almost every product on the market.

RECENT DECISIONS

Appellee attempts to tie its case to *Schad v. Borough of Mount Ephraim,* 101 S.Ct. 2176 (1981) a zoning case, by citing this Court's language "entertainment", ignoring the fact that this Court in *Schad* did not bestow First Amendment status upon all entertainment. Appellant trusts the States may still regulate, if not *prohibit,* the use of firearms in an urban area, when such activity is for entertainment purposes.

(Note that the City of Mesquite granted Appellee's zoning request. J.A. 69, Appellee's Brief 4 and no dispute exists as to zoning.)

Appellant does not view *Schad v. Borough of Mount Ephraim,* Supra, as new law but simply application of settled principles of law.

1. The activity prohibited consisted of First Amendment protected expression.

2. The Borough of Mount Ephraim failed to meet the burden of strict scrutiny.

In this context Appellant agrees with such holding and argues in accord therewith in its original brief. See quote from *Schneider v. State,* 308 U.S. at 150 quoted in *Schad v. Borough of Mount Ephraim,* Supra, at 101 S.Ct. 2183,

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at *other personal activities* . . . . " (Emphasis Added)

Appellant submits that playing coin-operated machines (not live dancing) constitutes "other personal activities", regulation of which is supported by "mere legislative belief".

Schad v. Borough of Mount Ephraim, Supra, is in no degree contrary to *Ginsberg v. New York,* Supra.

Nor has this Court retreated from its position of upholding the States' power to protect children from economic or social harm. In *Jones v. Helms*, 101 S.Ct. 2434 (1981), this court upheld the power of the State of Georgia to inhibit a parent's right of travel to further its ability to provide parental support for children. In the instant case, the City seeks, as one objective, to aid parents in providing an adequate lunch for their children and to lessen the dependence upon the free lunch program.

This Court, in *H.L. v. Matheson*, 101 S.Ct. 1164 (1981) reiterates the traditional distinction between adults and children. See 101 S.Ct. at 1176 (J. Powell, joined by J. Stewart, concurring opinion)

> "The state may have an interest in the family itself, the institution through which we inculcate and pass down many of our cherished values, *moral and cultural.* (Citation omitted). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, *especially during immature years.*" (Emphasis Added)

See also, 101 S.Ct. at 1177 (J. Stevens, concurring opinion).

> "The States' interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom *even though comparable restraints on adults* would be unconstitutionally impermissible." (Emphasis Added)

Again in *Michael M. v. Superior Court of Sonoma County*, 101 S.Ct. 1200 (1981), this Court upheld the power of the State to legislate differently for protection of minors. Justice Stevens, though dissenting on the basis of a gender based statute, concludes that all teenage sex could be prohibited. While pregnancies and veneral disease result from teenage sex, the same ills are associated with adult behavior.

Another recent (July, 1981) case involving First Amendment protection is *Metromedia, Inc. v. City of San Diego,* 101 S.Ct. 2882, which makes an important distinction in commercial and non-commercial First Amendment activity. Thus, even if Appellee's claim of First Amendment status is correct, the activity is, at best, commercial First Amendment activity and the burden on Appellant should be no greater than that placed upon the State of New York in *Ginsberg v. New York,* Supra, or the City of San Diego in *Metromedia v. City of San Diego,* Supra.

CONCLUSION

The argument of Appellee as to an independent State ground in inapplicable in this case. Appellee relies upon phrases from cases either not involving the relationship between children and the State or that involve basic rights that will affect the minor into majority (right to decide whether or not to bear children).

Thus, this Court should decide the issue as to whether or not playing a coin-operated amusement machine is a fundamental right. If such activity is not a fundamental right, the City's Ordinance should be upheld. If the act of playing a machine is a fundamental right, the case should be remanded to the District Court for additional testimony and proof as the case was tried upon the wrong theory.

Respectfully submitted,

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